No. 92-1123

In The

Supreme Court of the United States

October Term, 1992

IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA,

Petitioner,

v.

U.S. PHILIPS CORP., NORTH AMERICAN PHILIPS CORP., N.V., PHILIPS GLOEILAMPENFABRIEKEN and WINDMERE CORPORATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

JAY M. SMYSER, ESQ.
Counsel of Record
405 North Wabash Avenue
Suite 4903
Chicago, IL 60611
(312) 222-1770

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

MISCELLANOUS

TABLE OF AUTHORITIES – Continued

Page

No. 92-1123

In The

Supreme Court of the United States

October Term, 1992

IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA,

Petitioner,

v.

U.S. PHILIPS CORP., NORTH AMERICAN PHILIPS CORP., N.V., PHILIPS GLOEILAMPENFABRIEKEN and WINDMERE CORPORATION,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Pursuant to Rule 36 of the Rules of this Court, the Product Liability Advisory, Inc. ("PLAC") respectfully submits this brief as *amicus curiae* in support of the Respondents.[1]

[1] Counsel for all parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk.

The *amicus curiae* fully endorses the positions urged by the Respondents in their brief.

IDENTITY AND INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit membership corporation formed in June, 1983, pursuant to act 162, State of Michigan Public Acts of 1983.[2] Its principal purpose is the submission of appellate briefs, as friend of the Court, in cases raising significant issues affecting substantive and procedural law in the area of product liability.

PLAC members are all daily involved in litigation in American courts. As such participants in the work of the courts, they have a direct and substantial interest in preventing any serious inroads on the autonomy of the parties over the contractual terms of settlement. PLAC believes when the terms of such settlement call for the parties to seek vacatur, it is within the discretionary power of the reviewing court to grant it. As Judge Easterbrook conceded in *Matter of Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299, 1302 (7th Cir. 1988): "True, litigation is conducted to resolve the parties' controversies; precedent is a byproduct of resolving disputes rather than the *raison d'etre* of the judicial system." PLAC is vitally concerned with the impediment to settlement of litigation, and the additional work required of our courts, if this Court should rule, as Petitioner urges, that this Court's precedents do not provide authority for the

[2] The members of PLAC are listed in an Appendix hereto.

"practice of routinely vacating district court judgments at the request of settling parties."[3] Such a ruling would seriously interfere with the discretion conferred on the Courts of Appeal under 28 U.S.C. § 2106. PLAC is even more concerned about the consequences for our courts should this Court, as urged by *amicus* Trial Lawyers for Public Justice adopt "a rule requiring courts to deny post-settlement motions for vacatur unless the parties demonstrate that the judgment is infirm or that retention of the judgment is otherwise unfair for reasons not of the parties' making."[4] Such a rule would turn upside down all the policies promoting settlement of civil disputes and contradict this Court's wisdom that, "[C]ourts cannot make for the parties better agreements than they themselves have been satisfied to make." *Green County, Ky. v. Quinlan*, 211 U.S. 582, 596 (1909). Further, such a rule would require a reviewing court to withhold approval of a contract of settlement while the court engaged in the additional and feckless task of attempting to determine if somebody, somewhere might be prejudiced by recognition of such agreement.

PLAC respectfully suggests that the presentations thus far made in this case have not adequately addressed the more far-ranging pernicious effects that would necessarily follow from a decision in favor of Petitioner. Not only do the arguments in favor of Petitioner contradict all the policies inherent in the law promoting settlement of

[3] Petitioner's Brief on the Merits, p. 10.

[4] Brief of Trial Lawyers for Public Judgment, P. C. (hereafter "TLPJ brief"), p. 1. The other *amicus* supporting Petitioner is Sears, Roebuck & Co., referred to hereafter as "Sears."

disputes but their adoption would also impose a new duty on reviewing courts: to consider the possible effects of settlements on those who are not even in front of the court.

> Judges must have at heart the interests of other litigants in future cases, and hold them equal in weight with the interests of today's.[5]

It would seem a daunting task when a court undertakes to give consideration equal to that accorded the actual parties to litigation to "the interests of other litigants in future cases." When a court reaches for its crystal ball, which "other litigants in future cases" is it to consider? Because the vagaries of litigation frequently mean that a party on one side of an issue today may well be on the other tomorrow, certainly a court must be given some guidance in the speculative task of determining what "other litigants in future cases" it is to deem worthy of attention equal to that it gives the actual parties to the litigation. Overburdened as our courts are, any impediments to the process that permits settlements to dispose of much of their workload, much less additional duties imposed on courts in the course of approving what have been routine settlements, can only be destructive of our system of justice as we know it. The phantom public policy grounds urged as justifying this radical revision of the time-honored policies promoting settlements not only do not exist; they also misconceive the fundamental purpose of civil litigation. Consequently, PLAC is vitally

[5] *Matter of Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299, 1303 (7th Cir. 1988); see also, TLPJ brief, p. 4.

concerned with preserving the policies promoting settlements and the discretion conferred on our reviewing courts under 28 U.S.C. § 2106.

SUMMARY OF ARGUMENT

The sole legitimate issue is whether the court below abused its discretion in denying Petitioner's opposition to the parties' joint motion to dismiss and vacate. *U.S. Philips Corp. v. Windmere Corp.*, 971 F.2d 728 (Fed. Cir. 1992). Putting aside the question of Petitioner's standing, if any, to raise the issue, what the court below did was not unusual. In the exercise of their discretionary power under 28 U.S.C. § 2106, federal reviewing courts, generally, will routinely vacate judgments when the parties settle. 13A Wright, Miller & Cooper, *Federal Practice & Procedure*, § 3533.10, at 432 (2d ed. 1984). As the court below said, the practice is not absolute.

> Although in the Federal Circuit vacatur is the general rule, we do not hold that vacatur must always be granted, whatever the circumstances.

971 F.2d at 731.

Nonetheless, in recent years, according to Prof. Fisch, three different approaches have developed to the issue of whether vacatur sought by the parties as a part of settlement is proper:

> The Second Circuit approach, reflected in the *Nestle [v. Chester's Market, Inc.*, 756 F.2d 280 (2d Cir. 1985)] decision, accepts the importance of encouraging settlement and, accordingly, adopts a rule of law in which settling litigants are entitled

> to vacatur of the trial court's judgment virtually as a matter of right. The Seventh Circuit[6] concludes that the public interest in the finality of judgments outweighs the parties' private interests and determines that motions to vacate should generally be denied. The Ninth Circuit adopts a case-by-case balancing approach in which the courts consider the implications of the analysis on the specific facts of a particular case.[7]

Fisch, "Rewriting History: The Propriety of Eradicating Prior Decisional Law through Settlement and Vacatur, 76 *Cornell L. Rev.* 589, 592 (1991).

There is a division between Petitioner and its *amici* on the approach they want this Court to take. Petitioner implies the Federal Circuit abused its discretion, arguing that this Court should reverse because the court below did not properly balance the factors it should have considered; *amicus* TLPJ urges this Court to adopt a rule that would embody a presumption against vacatur when a case is settled pending appeal; and *amicus* Sears apparently also believes the court below abused its discretion, arguing that its order was improper "under the circumstances."[8] But Petitioner and its *amici* share a common

---

[6] *Matter of Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299 (7th Cir. 1988); followed in *Clarendon, Ltd. v. Nu-West Industries, Inc.*, 936 F.2d 127 (3d Cir. 1991) and *In re United States*, 927 F.2d 626 (D.C. Cir. 1991).

[7] *National Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762 (9th Cir. 1989).

[8] Petitioner's Brief on the Merits, p. 35; TLPJ brief, p. 14; Sears' brief, p. 10.

belief that what was most objectionable about what the court below did is that the practice is ***routine***.[9] It may well be that it is that aspect of the practice that most recommends it. PLAC respectfully submits that the ***costs*** of changing the ***routine*** practice far outweigh the costs, in large measure imaginary, Petitioner and its *amici* conceive attach to the present practice.

---

[9] "In sum, the circuit courts should not ***routinely*** grant motions to vacate on settlement, and the Federal Circuit should not have done so here." Petitioner's Brief on the Merits, p. 35 (emphasis added). "In fact, however, ***routine*** vacatur involves significant public costs. Moreover, the availability of ***routine*** vacatur discourages rather than encourages settlements by the litigants." TLPJ brief, p. 2 (emphasis added). "The Court has granted certiorari to consider whether courts of appeal should ***routinely*** vacate lower court judgments when cases are settled while on appeal." Sears, Roebuck & Co. brief, pp. i and ii (emphasis added).

I. THE APPROACH FAVORED BY PETITIONER AND ITS *AMICI* IGNORES THE CONSTITUTIONAL LIMITATION OF THE JURISDICTION OF FEDERAL COURTS.

On reflection and careful study it can be seen that the arguments for radical revision of the present system permitting vacatur on settlement in the discretion of a reviewing court are based on Judge Easterbrook's premise:

> Judges must have at heart the interests of other litigants in future cases, and hold them equal in weight with the interests of today's.

Matter of Memorial Hosp. of Iowa County, Inc., 862 F.2d 1299, 1303 (7th Cir. 1988).[10]

Admirable as such sentiments might seem in the abstract, they pose serious questions about the propriety of injecting such a consideration into the decision of a pending case. Our traditions embrace the value of a careful and discriminating adherence to the "case or controversy" limitation of Article III to the United States Constitution and avoidance of advisory opinions not moored to the facts of an immediate dispute.[11] As Justice Scalia wrote in *Hewitt v. Helms*, 482 U.S. 755, 761 (1987): "The real value of the judicial pronouncement – what

[10] See also, Fisch, "Rewriting History: The Propriety of Eradicating Prior Decisional Law through Settlement and Vacatur," 76 *Cornell L. Rev.* 589, 620 (1991) and TLPJ brief, p. 4.

[11] See, Brilmayer, "The Jurisprudence of Article III: Perspective on the 'Case or Controversy' Requirement," 93 *Harv. L. Rev.* 297 (1979).

makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion – is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*" (emphasis in original). It seems appropriate, therefore, to consider whether the decision of an issue on the basis of the hypothetical interest of a hypothetical party – holding "the interests of other litigants in future cases . . . equal in weight with the interests of today's" – violates this limitation.[12]

II. CONTINUED SMOOTH FUNCTIONING OF THE SETTLEMENT PROCESS REQUIRES THAT COURTS PROMOTE IT, NOT THWART IT ON THE BASIS OF THE IMAGINED INTERESTS OF HYPOTHETICAL FUTURE LITIGANTS.

It does not seem to be overstatement to suggest that the policy of the law promoting settlement of disputes is necessary to the survival of our system of courts. From an early time, the law has favored even the most imperfect settlement to continued pursuit of a controversy in

[12] *Amicus* TLPJ concedes that, "It is not possible to conduct after-the-fact research to ascertain whether courts have vacated valuable decisions; when a decision is vacated prior to the publication of a written opinion, there is often nothing left to inform the public what was decided." TLPJ brief, p. 4, footnote 3.

court.[13] There is no discernible policy in the law favoring early over later settlements.[14]

> It is hard to be against settlement. Any disposition that the parties to the litigation unanimously endorse has much to be said for it – it produces peace for the parties and frees scarce judicial time to attend to litigants who need it. A settlement is the parties' business. They may compromise just as they may reach any other (lawful) contract.

Matter of Memorial Hosp. of Iowa County, Inc., 862 F.2d 1299, 1302 (7th Cir. 1988).[15]

On this all seem to agree. The problem comes when the parties' bargain calls for judicial action. In this respect, what the court below did is not unusual and does

---

[13] "An ill agreement is better than a good judgment." George Herbert (1593-1633), "Outlandish Proverbs," (1640) #264 in *The Works of George Herbert* (Oxford: Clarendon Press, 1945), p. 329. "An indifferent agreement is better than carrying a cause at law." Thomas Fuller (1654-1734), *Gnomologia*, 1732, no. 637.

[14] "Although settlement and vacatur put an end to the particular dispute before the court, the systematic practice of granting motions to vacate when a case is settled on appeal encourages parties to delay settlement until after trial. Accordingly, the availability of vacatur actually discourages early settlement and wastes judicial resources in the process." TLPJ brief, p. 8. By such specious reasoning, all settlements that await the result of a trial waste judicial resources. We do not think so. Settlement, early or late, is a positive result.

[15] It should be noted that the vacatur sought in this case would also have eradicated a finding of contempt against one of the parties, something which, understandably, the court thought beyond the legitimate power of the parties.

not seem unreasonable. Even though it questioned Petitioner's standing to raise the issue, it examined the merits of Petitioner's opposition to the parties' request for vacatur and, in the exercise of its discretion, denied Petitioner's motion. Now one can disagree with the view of the merits taken by the court below – whether it properly balanced the factors it was obliged to consider and whether its decision was proper "under the circumstances" –, but it hardly seems that such disagreement rises to the level of establishing that the court below abused its discretion. It was fully informed of the Petitioner's interest in opposing vacatur but, nonetheless, decided to grant vacatur. Although neither Petitioner nor its *amici* use the term "abuse of discretion," that is, we believe, the standard this Court will apply to judge what happened. See, *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633 (1961); *Chambers v. Nasco, Inc.*, 111 S. Ct. 2123, 2138 (1991). As Justice O'Connor wrote in *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2460 (1990):

> [S]ome variation in the application of a standard based on reasonableness is inevitable. 'Fact-bound resolutions cannot be made uniform, through appellate review de novo or otherwise.' *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d at 936; see also Shaffer & Sandler 14-15. An appellate court's review of whether a legal position was reasonable or plausible enough under the circumstances is unlikely to establish clear guidelines for lower courts, nor will it clarify the underlying principles of law. See *Pierce, supra*, 487 U.S. at 560-561, 108 S. Ct., at 2547-2548.

As one author on the subject has written:

> Under an adversary system which produces many independent claims containing identical issues, rules of issue preclusion achieve a compromise between party autonomy and the judicial value of finality of judgments, economy, legitimacy, and consistency.[16]

But establishing that compromise, given the infinite variety of litigation confronting our courts, is a uniquely judicial task. Even accepting for purposes of argument that settlement conditioned on vacatur is to avoid future preclusion, whether this is permissible in a particular instance is the discretionary call of an informed court.[17] That a court addresses this question with a presumption in favor of permitting settlement on terms agreed to by the parties is consistent with all our law. If, as the court below said, the court is given sufficient, concrete reason for preferring to allow the rules of preclusion to operate, it can do so.

That this issue has reached this Court raises serious questions about the manner in which litigation has been transformed in recent years. It is in the very nature of

---

[16] Zeller, "Avoiding Issue Preclusion by Settlement Conditioned upon the Vacatur of Entered Judgments," 96 *Yale L. J.* 860, 860 (1987).

[17] *Amicus* TLPJ seems to believe that the only litigants who are induced to settle on condition that vacatur eliminates the threat of preclusion are large institutions. We do not believe this important issue should be decided on such an "us" versus "them" basis. Certainly it does not impose any significant burden on the imagination to realize that such a result might also induce settlement by a "small" litigant.

litigation that it is not a process assured of producing enduring truths. We proceed to get the best resolution we can of a conflict on the basis of whatever evidence is currently available. Next week a key witness may return to our shores. Next month examination of files prior to their destruction may turn up a critically important document. No matter. The essential point has always been to get cases decided ***now***. Almost 100 years ago, William James explained:

> Law courts, indeed, have to decide on the best evidence attainable for the moment, because a judge's duty is to make law as well as ascertain it, and (as a learned judge once said to me) few cases are worth spending much time over: the great thing is to have them decided on ***any*** acceptable principle, and got out of the way.[18]

Consequently, PLAC urges that this Court leave things as they have been.

The question of whether our reviewing courts should grant vacatur on motion of all ***actual parties*** is addressed to the court's sound discretion and in considering it courts operate with a presumption in favor of settlement. If somebody conceives that such a course will prejudice him or her, the mechanism for intervention is available under the rules and objections, concrete objections, will

---

[18] W. James, *The Will To Believe*, an address to the philosophical clubs of Yale and Brown Universities, published in the New World, June 1896, reprinted under that title (Longmans, Green & Co. 1919), 1, at p. 20. Because of its consistency with his philosophy and in light of his life-long friendship with James, Oliver W. Holmes, Jr. it would seem, is a logical candidate for the "learned judge."

be heard. The alternative, advocated by *amicus* TLPJ and the Seventh Circuit, is to involve courts in another "decision point" involving the highly speculative business of trying to determine the effect of the court's precedent on parties not before the court. A quarter of a century ago, John P. Frank delivered a series of lectures with the theme that, "the entire body of the law should be reviewed to reduce and simplify decision points."[19] He explained:

> What is happening in the course of the law is an almost endless increase in the number of decision points, usually without much regard to the consequences the increase will have on the legal system. If I may use a fanciful illustration, think of the elephant in a circus, standing with feet close together upon a small supporting pedestal. Let the elephant be the collection of decision points, and the pedestal the legal system that has to make the decisions. What happens is that the elephant grows and grows and grows as he absorbs more and more decision points. Occasionally some are taken away, as for example if my hypothetical state should eliminate the process server requirement we have discussed, but the general trend is to enlarge. The enlargement comes in two primary ways. First, the law itself grows. Second, there are more people presenting matters that need to be decided. The combined effect is that at some point, the weight of the elephant collapses the pedestal.[20]

---

[19] Frank, *American Law: The Case for Radical Reform* (Macmillan 1969), p. 65.

[20] *Ibid.*, at pp. 68-69.

Amicus TLPJ asks for an additional decision point to assure that unknown hypothetical litigants are not deprived of the possible preclusive effect of a judgment all parties ask to have set aside:

> [T]he courts should review motions to vacate with the presumption that vacatur will not be granted at the request of the parties. Absent a showing that the underlying judgment is infirm, courts should be directed to deny motions to vacate a case that has been settled pending appeal.[21]

The proposition raises more questions than it could possibly answer. Does this proposition embody cases settled prior to any opinion by a reviewing court? Does it embrace cases settled before time for a petition for rehearing has elapsed? Does it apply to cases while a petition for certiorari is pending? Should this proposition apply only when identifiable other litigants have appeared to oppose vacatur? If this Court adopts the TLPJ proposition, it is altogether likely that the questions about attempts to settle cases pending appeal have only started to appear on its docket.

CONCLUSION

For the foregoing reasons, PLAC respectfully urges this Court to reaffirm the principle that a motion for vacatur in a pending appeal is addressed to the sound discretion of the reviewing court, which will consider it

---

[21] TLPJ brief, p. 14.

with a presumption favoring settlement of disputes but aware that it must not exercise its discretion to work a demonstrable injustice.

Respectfully submitted,

JAY M. SMYSER *

405 North Wabash Avenue
Suite 4903
Chicago, IL 60611
(312) 222-1770

THE PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1800 Fisher Building
3011 West Grand Boulevard
Detroit, MI 48202

* Counsel of Record

APPENDIX

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
Corporate Members

American Automobile Manufacturers Association
American Home Products Corp.
American Telephone and Telegraph
Amoco Corporation
Amsted Industries Incorporated
Andersen Corporation
Anheuser-Busch Companies, Inc.
Association of International Automobile Manufacturers, Inc.
Atlantic Richfield Company
Beech Aircraft Corp.
The Boeing Company
Bridgestone/Firestone, Inc.
British Aerospace
The Budd Company
Burroughs Wellcome Company
Caterpillar, Inc.
Chrysler Corporation
Clark Material Handling Company
The Coca-Cola Company
The Coleman Company
Dana Corporation
Deere & Company
Defense Research Institute
Digital Equipment Corporation
Dow Chemical Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Company
Exxon Corporation
FMC Corporation
Federal-Mogul Corporation
Ford Motor Company

Freightliner
The Gates Corporation
General Electric Company
General Motors Corporation
Goodyear Tire & Rubber Company
Great Dane Trailers, Inc.
Harnischfeger Industries, Inc.
Hoechst Celanese
Honda North America, Inc.
Hyundai Motor America
Ingersoll-Rand Company
International Paper Company
Isuzu Motors America, Inc.
Johnson Controls, Inc.
Joy Technologies, Inc.
Kawasaki Motors Corp., U.S.A.
Kraft General Foods, Inc.
Mazda Motor of America
Melroe Company
Mercedes-Benz of North America, Inc.
Merck & Company, Inc.
Michelin Tire Corporation
Miller Brewing Company
Minnesota Mining and Manufacturing Company
Mitsubishi Motor Sales of America
Monsanto Company
O.F. Mossberg & Sons, Inc.
Navistar International Transportation Corp.
New United Motor Manufacturing, Inc.
Nissan Motor Corporation, U.S.A.
Otis Elevator Company
PACCAR, Inc.
PepsiCo
Pfizer Inc.
Philip Morris Companies Inc.
Piper Aircraft Corporation
Pirelli Armstrong Tire Corporation

Playtex Family Products Corp., Inc.
Porsche Cars North America, Inc.
Procter & Gamble Company
RIR Tobacco Co.
Rockwell International
Schindler Elevator Corporation
Sears, Roebuck and Company
Sherwood Division of Harsco Co.
Snap-on Tools Corporation
Squibb Corporation
Sturm, Ruger and Company
Subaru of America, Inc.
Sunstrand Corporation
The Toro Company
Toyota Motors Sales, U.S.A., Inc.
TRW Inc.
Union Carbide Corporation
The Uniroyal Goodrich Tire Co.
Unocal Corporation
The Upjohn Company
U.S. Tobacco
Volkswagen of America, Inc.
Volvo North America Corporation
Vulcan Materials
Jorvis B. Webb Company
Whirlpool Corporation
White Consolidated Industries, Inc.
Yamaha Motor Corporation, U.S.A.